Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1993

ALBERT IVERSON,

Petitioner,

v.

GARY WEEKS, in his official capacity as the Administrator of THE OREGON DEPARTMENT OF INSURANCE AND FINANCE, SARA HARMON, in her official capacity as the Administrator of the WORKERS COMPENSATION DIVISION, LIBERTY NORTHWEST INSURANCE COMPANY, an Oregon corporation,

Respondents.

Petition For Writ Of Certiorari To The Oregon Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This case squarely presents the question of whether recipients of Worker's Compensation "time loss" benefits (benefits for daily sustenance needs of food, clothing and shelter) are entitled to notice and due process hearings prior to termination of these benefits as has been held to be required by this Court under the Fifth and Fourteenth Amendments in the line of cases starting with *Goldberg v. Kelly*, 397 U.S. 254 (1970), and in keeping with the analysis used by this Court in *Matthews v. Eldridge*, 424 U.S. 319 (1976).

Although such rights are afforded to recipients of almost every other kind of state benefit in the State of Oregon, including drunk drivers prior to license suspension, and are afforded to public benefit recipients in other states throughout the United States, the State of Oregon permits unilateral termination of its worker's compensation benefits without prior notice or hearing. And furthermore, even after an injured worker's success at a post termination due process hearing, Oregon provides for a stay of payment of retroactive benefits until all appeals processes have been concluded.

Petitioner, Albert Iverson, had injured his knee and back in a work related accident. His Worker's Compensation claim had been accepted and he was receiving benefits, including benefits in lieu of wages known as Temporary Total Disability, or "time loss" benefits. These are paid on a bi-monthly basis and are computed at two-thirds of the worker's wage on the date of injury.

QUESTIONS PRESENTED FOR REVIEW – Continued

On October 7, 1991, these benefits were terminated. There was no prior notice. And, although Oregon laws and regulations provide for an administrative hearing, there is no requirement or provision for continued benefits pending the hearing and decision. The time schedule is provided by Oregon laws as follows:

> 90 days to hearing
>
> 30 days for a decision
>
> 6 months to 2 years: If the decision is appealed by the insurer, no retroactive benefits are paid until that appeal becomes final, a process that lasts anywhere from an additional six months to three years.

Because of the inadequacy of any remedy provided by the State's Administrative procedures, and because of the apparent unconstitutionality of the State procedures, Mr. Iverson filed an action in the Circuit Court of the State of Oregon to compel the state division which promulgated the Worker's Compensation rules and procedures to immediately promulgate rules requiring due process prior notice and hearing and immediately restoring Mr. Iverson's benefits until such time as those due process requirements were met.

Disregarding this Court's mandate in the *Goldberg v. Kelly* case, supra, and those following, the Oregon Circuit Court dismissed Mr. Iverson's complaint, agreeing with Defendants' arguments that the post termination procedures provided by the State of Oregon were constitutionally adequate.

QUESTIONS PRESENTED FOR REVIEW – Continued

On October 6, 1992, Mr. Iverson filed an appeal of that dismissal with the Oregon Court of Appeals. At that time, although he had won the post termination hearing regarding his time loss benefits, payment of retroactive benefits had been stayed by the filing of an appeal by the Insurance carrier, Liberty Northwest. Thus, a year had passed with no remedy available through the procedures provided by the State, and certainly no *prior* remedies.

The Court of Appeals affirmed the dismissal by the Court below, and, on September 21, 1993, the Oregon Supreme Court refused review.

In refusing to review this matter, the Oregon Supreme Court has held that the State of Oregon is not required by the due process clause of the Fifth and Fourteenth Amendments to provide recipients of Workers' Compensation time loss benefits notice and opportunity for a hearing prior to the termination of their benefits. The questions presented are:

1. Where an injured worker has had his claim accepted for Workers' Compensation benefits and is receiving life sustenance benefits in the form of time loss payments, do the due process clauses under the Fifth and Fourteenth Amendments of the U.S. Constitution, and the holdings in the line of cases beginning with *Goldberg v. Kelly*, supra, require that the State of Oregon adopt laws and regulations guaranteeing recipients of such benefits the right to a notice and due process hearing prior to the termination of benefits?

QUESTIONS PRESENTED FOR REVIEW – Continued

2. Where the State of Oregon promulgates laws and regulations that control every aspect of the Workers' Compensation system, including the contents of notices, amounts of payments, timing of payments, termination of benefits, hearing rights, notice rights, etc., but the actual administration of said benefits is performed by private insurance companies, do the actions of the private insurers pursuant to these rules and regulations constitute sufficient "state action" to hold them accountable to the due process requirements of the U.S. Constitution?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding.

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No. _____

In The

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ALBERT IVERSON,

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v.

GARY WEEKS, in his official capacity as the Administrator of THE OREGON DEPARTMENT OF INSURANCE AND FINANCE, SARA HARMON, in her official capacity as the Administrator of the WORKERS COMPENSATION DIVISION, LIBERTY NORTHWEST INSURANCE COMPANY, an Oregon corporation,

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Petition For Writ Of Certiorari To The Oregon Supreme Court

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DECISIONS BELOW

The Judgment of the Oregon Supreme Court was handed down on September 21, 1993, SC S40515, 317 Or 583 (1993), and is reproduced as Appendix (App.) A. There was no written opinion issued. The Judgment of the Oregon Court of Appeals denying reconsideration was handed down on September 1, 1993, CA A76945, and is reproduced as Appendix (App.) B. The Judgment of the

Oregon Court of Appeals affirming the dismissal of the Circuit Court was handed down on June 16, 1993, CA A76945, 121 Or App. 206 (1992) and is reproduced as Appendix (App.) C. The Judgment of the Circuit Court of the State of Oregon for Marion County was entered on September 23, 1992, 92-C 10247, and is reproduced, along with the Orders of Dismissal for each of the Defendants as Appendix D, E, and F. The Notice of Entry of Judgment was thereafter entered as a final judgment in the Circuit Court of the State of Oregon for Marion County on November 4, 1993, which is reproduced along with the accompanying docket entry as Appendix G. Page references are to the version in the appendix.

JURISDICTION

The decision of the Oregon Supreme Court, review of which is sought on petition, was entered on September 21, 1993, and the appellate judgment entered on October 28, 1993. This Court has jurisdiction over this matter pursuant to 28 U.S.C. Sec. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The federal constitutional provisions at issue in this matter are the Fifth and Fourteenth Amendments to the United States Constitution. The Fifth Amendment provides in part: "[N]or shall any person be deprived of life, liberty, or property without due process of law."

The Fourteenth Amendment provides in part: "[N]or shall any state deprive any person of life, liberty, or property without due process of law."

The statutes at issue are Oregon Revised Statutes (ORS) Chapter 656, and in particular 656.262, 656.210(1), 656.283, 656.289 and 656.313. The administrative rules at issue are Oregon Administrative Rules (OAR) Chapter 438 and in particular 438-05-055 through 438-05-070, and 438-13-010, and 436-60-140(6). The relevant portions of the statutes are set out at Appendix H, and the relevant portions of the Administrative Rules are set out at Appendix I.

Page references are to the version in the appendix.

STATEMENT OF THE CASE

A. Procedural History

This action was originally filed with the Circuit Court of the State of Oregon invoking a form of mandamus action in Oregon authorized by statute (ORS 183.480 and 183.490) to compel the State of Oregon through its agency, the Department of Insurance and Finance, and in particular, the Workers' Compensation division of said Department, to adopt rules and regulations requiring notice and opportunity to be heard prior to termination of time loss benefits. This action is authorized to be brought before the court upon a showing that the party will suffer substantial and irreparable harm if interlocutory relief is not granted. It was here, in this action before the Oregon Circuit Court, that the constitutional issues were raised that the existing administrative rules and regulations

were constitutionally inadequate under the due process requirements of the U.S. Constitution.

Because Petitioner, Mr. Iverson, had had his time loss Workers' Compensation benefits terminated, he was simultaneously pursuing his administrative remedies under the Workers' Compensation system. But that system had not provided for prior notice or opportunity for hearing, and had no power to order immediate reinstatement of his terminated benefits – benefits upon which he was dependent for living. (As will be set forth later, that system, even with Mr. Iverson's winning at every level, resulted in deprivation of the terminated benefits for almost two years. Thus, there was a clear showing of substantial and irreparable harm.)

The Circuit Court, upon arguments by Defendants that Mr. Iverson had an adequate remedy in the Workers' Compensation system, dismissed Petitioner's complaint. Petitioner filed timely appeals to the Oregon Court of Appeals, which affirmed the Circuit Court's dismissal without opinion on June 16, 1993. Mr. Iverson then sought review by the Oregon Supreme Court. That court denied review on September 21, 1993.

B. The Case

This is a case to compel the State of Oregon, through its agency, the Workers' Compensation Division of the Department of Insurance and Finance, to adopt rules and regulations requiring notice and opportunity for a hearing prior to termination of Workers' Compensation time loss benefits. (Also, at the time it was filed, Mr. Iverson

also sought an order immediately reinstating his terminated benefits until such procedures were complied with.)

The Oregon Workers' Compensation system is a completely a creature of statute and regulations. Every aspect of the system's administration is provided for within the Oregon Statutes and the rules promulgated by the defendant State agencies. The actual day-to-day administration of the system is placed in the hands of private insurance carriers, such as defendant, Liberty Northwest, but their every action is taken as required or allowed by the system.

On December 6, 1990, Mr. Iverson sustained a knee injury on the job, and filed a Workers' Compensation claim. The treating physician diagnosed the injury as work related, and, as provided by statute, defendant insurer accepted the claim. Pursuant to State law, Mr. Iverson began receiving time loss benefits, Temporary Total Disability – benefits which are designed to provide for the daily needs of living for an injured worker until they have recovered or return to work.

On October 8, 1991, Defendant Liberty Northwest, without notice or opportunity for prior hearing, terminated Mr. Iverson's temporary total disability benefits. The State of Oregon, through its laws and regulations promulgated by the defendant agencies, permit Workers' Compensation insurance carriers to take such action. Defendant, Liberty Northwest, did not, and is not required to under current workers' compensation regulations, notify Petitioner of the termination of his time loss benefits, nor provide Petitioner an opportunity to contest

the basis of the unilateral suspension of the time loss (TTD) benefits prior to termination.

After the termination, Mr. Iverson requested a hearing. *Post termination* hearings are the only procedures provided by the State for injured workers to contest termination of their benefits.

Thus, although Mr. Iverson could easily demonstrate that the termination was wrong, there was no procedure for restoration of benefits that would take less than four months to two years.

Mr. Iverson requested a hearing on the termination of his benefits. The Hearing was scheduled before the Workers' Compensation Referee on January 15, 1992. At hearing, defendant Liberty Northwest requested the record remain open in order that they be able to depose their own insurance doctor, Dr. Coletti, who was now supporting continued compensability of Mr. Iverson's injury. The Referee, as is provided under the administrative rules, granted the request which resulted in further delay.

At the time Judge Miller dismissed Plaintiff's complaint, the workers' compensation proceedings were on hold pending the scheduling of the deposition in the administrative proceeding.

Eventually closing arguments were held, and the Referee, on May 29, 1992, eight months after the termination, upheld Mr. Iverson's claim and entitlement to benefits. So clear was Mr. Iverson's entitlement to continued benefits that the Referee wrote in his opinion:

> *"I will candidly state that I am amazed this issue made it to the hearing. Liberty issued their denial which, on its face, indicated an intent to continue to process the accepted claim. However, the accepted claim has not been processed and temporary total disability was unilaterally terminated. Liberty offers no reasonable explanation for its failure to continue to pay time loss compensation."*

But, although Mr. Iverson won the hearing, Liberty Northwest, as provided for in the Workers' Compensation system, appealed the decision, thus staying payment of the retroactive time loss payments, and all medical benefits. Thus, Mr. Iverson, still did not receive the terminated benefits, now eight months in arrears.

At the time Judge Miller dismissed the complaint, Petitioner remained disabled and unable to work. He was subsisting on approximately $250.00 per month social security income. Not only was it clear that Mr. Iverson had not been provided prior notice and opportunity for a hearing, it was also clear that Oregon did not, and was not providing any speedy administrative procedure for restoration of benefits. There was no question but that Mr. Iverson would thereby suffer substantial and irreparable harm.

At each stage of the civil proceedings, Petitioner presented to the Court clear arguments that the U.S. Constitution required prior notice and opportunity to be heard, and that the post termination procedures under the Workers' Compensation system were not speedy nor adequate remedy for the termination and continued deprivation of his time loss benefits.

(While the civil case proceeded, defendant Liberty Northwest, as provided by the procedures of the state defendants, continued to appeal each winning decision of Mr. Iverson, resulting in continued stays of payment of the ordered retroactive benefits. This continued for almost two years, and, without action by the Civil courts, there was no other remedy for Mr. Iverson.)

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10.1(b) lists among the considerations governing review on certiorari the circumstance when a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort, or of a Federal Court of Appeals. Under Rule 10.1(c), a ground for review exists when a state court has decided an important question of federal law which has not been, but should be, settled by this court, or has decided a federal question in a way that conflicts with applicable decisions of this Court. All of these grounds for review are present in this case.

I.

THIS CASE INVOLVES AN IMPORTANT CONSTITUTIONAL QUESTION THAT SHOULD BE RESOLVED BY THIS COURT – IS A RECIPIENT OF WORKERS' COMPENSATION TIME LOSS BENEFITS ENTITLED TO NOTICE AND OPPORTUNITY FOR A HEARING PRIOR TO THE TERMINATION OF SAID BENEFITS?

The decision by the Oregon Supreme Court, affirming the dismissal by the courts below, allows a system to

continue whereby thousands of injured workers have their Workers' Compensation benefits terminated each year without prior notice or hearing and are required to try to survive without means of support for months or years until retroactive benefits can be achieved through the State's Workers' Compensation administrative appeals system. For Mr. Iverson, who won overwhelmingly at every stage of that administrative proceeding, this meant that he was deprived of these benefits for over two years.

In *Goldberg v. Kelly*, supra, this Court firmly established that receipt of government benefits is a property right protected by the Fifth and Fourteenth Amendments to the U.S. Constitution. The fundamental Constitutional premise from the *Goldberg* case and continuing in all cases thereafter, is that payment of retroactive benefits does not satisfy due process requirements for pre-termination notice and hearing.

In deciding what kinds of interests are entitled to prior notice and hearing protection, this Court set out certain criteria in the case of *Matthews v. Eldridge*, 424 U.S. 319 (1976). Applying the *Matthews* criteria to the instant record warrants the fullest application of due process requirements.

The first prong of the *Matthews* test requires consideration of the interest affected. Oregon Workers' Compensation time loss benefits are designed to substitute for lost income. They are essential to the sustenance of the injured worker pending a hearing and a decision.

The risk of erroneous deprivation of the TTD benefits is great. In Oregon, the insurance company, with

unbridled discretion, is the sole fact finder in deciding whether to terminate TTD benefits. The insurer retains physicians to examine the claimant, and apparently bases its decision to terminate TTD benefits only on these reports.

The divergent medical opinions in the instant record underscore the danger of erroneous deprivation. In Mr. Iverson's case, not all of the three physicians involved in the claim agreed on the major cause of plaintiff's condition. Dr. Coletti, the original insurer's medical physician, eventually did reverse his previous conclusion and agreed with Petitioner's treating physician that the continued condition was work related. But the insurer unilaterally terminated benefits and would not restore them without being ordered to do so. Meanwhile, plaintiff had no choice but to sit and wait. The mere fact that defendant insurer's decision turns on a crucial issue not even expert physicians can agree on clearly illustrates the danger of erroneous deprivation.

The total absence of notice of termination further enhances the risk. There is absolutely no notice of termination, nor any pre-termination opportunity to contest the basis of the decision. The decision also renders plaintiff financially unable to obtain a second opinion from his treating physician; an opinion given more weight at hearing than the insurance doctors' opinions. Thus, the unchecked discretion, divergent and ever changing medical opinions, and the paralyzing effect of the unilateral termination create a great risk of erroneous deprivation of a benefit designed to ensure the health and safety of the claimant.

The third prong of the *Matthews* test is the governmental burden in affording the procedural safeguard. Although the risk of paying benefits to ineligible recipients exists as in *Matthews*, the burden of providing some form of pre-termination procedural safeguards has been held in all life support benefit cases to be outweighed by the Constitutional interests involved on behalf of the recipient.

The current workers' compensation system in Oregon still permits termination prior to notice and hearing, so that an injured worker's remedy under that system is only for retroactive restoration of benefits, a remedy that is constitutionally inadequate for benefits necessary for a person's maintenance and support.

Moreover, for the Oregon Trial Courts to refuse to exercise jurisdiction at the outset, means that even the two year administrative procedure Mr. Iverson had to follow will virtually always play itself out before the Civil case reaches the Oregon Supreme Court, leaving the Defendants to claim that the case is moot. Thus, there is no effective way for the Petitioner to prevent repetition of the process to himself, or any other recipient, without the action brought by Petitioner in the Civil courts to compel a change in the system.

Petitioner maintains that the issue raised is of such fundamental constitutional importance, and so likely to happen again if both his case, and Workers' Compensation cases in general, that the issue is not moot for purposes of obtaining a decision by this Court. The complained of action is likely to happen again to Mr. Iverson because all of the current rules and regulations

pertaining to Workers' Compensation benefits provide only for post termination hearings and no prior notice.

For a discussion of these issues, Petitioner directs the Court to the case of *Royer v. Department of Employment Security*, 188 NH 673, 394 A 2d 828 (1978). On a similar issue involving termination of unemployment benefits without prior notice and hearing, the New Hampshire Court said that retroactive payment of the benefits did not render the case moot. The Court considered the fact that plaintiff had raised issues of "significant constitutional dimensions"; there was pressing public interest in having those issues decided on the merits to avoid future litigation, and there was a reasonable expectation that the plaintiff could be subject to the same actions again. The Court also pointed to the fact that post termination administrative proceedings, although not constitutionally sufficient, might always result in retroactive payment before the merits could be addressed by the civil courts, thus leaving the plaintiffs with no legal redress.

From a practical standpoint, if the trial courts of Oregon continue to refuse to entertain actions such as the one brought by Mr. Iverson, the one to two year appeal process could render all such cases "moot" and deprive injured workers of redress for what appears to be an obvious violation of their Constitutional rights.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT, AND OTHER STATE AND FEDERAL COURTS, REGARDING THE REQUIREMENT OF DUE PROCESS NOTICE AND HEARING PRIOR TO THE TERMINATION OF A GOVERNMENT LIFE SUPPORT BENEFIT

In *Goldberg v. Kelly,* supra, this Court held that life maintenance payments under the Aid to Families with Dependent Children (welfare) are a property interest entitled to due process protection under the U.S. Constitution. And, this Court held also that such recipients were entitled to notice and opportunity for a hearing **prior** to the termination of those benefits.

In *Matthews v. Eldridge,* supra, this Court set forth criteria which clearly would apply greatest due process protections to benefits such as Oregon Workers' Compensation time loss benefits, including rights to notice and hearing prior to termination. (See argument in I. above.)

Other states, including the New Hampshire Supreme Court, have provided the due process protections of prior notice and hearing to such benefits, and have not refused to decide the issue merely because there was an administrative procedure available for providing retroactive restoration of benefits that may have run its course prior to the review reaching New Hampshire's highest court. *Royer v. Department of Employment Security,* supra.

The Oregon Supreme Court has sanctioned the refusal of the State's civil courts to address an issue that

has been decided contrary to the Oregon State's administrative scheme by the U.S. Supreme Court, and the highest Courts of other states.

III.

THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION BELOW INVOLVES AN IMPORTANT FEDERAL QUESTION AND CONFLICTS WITH DECISIONS OF THIS COURT REGARDING THE REQUIREMENT OF DUE PROCESS NOTICE AND HEARING PRIOR TO THE TERMINATION OF A GOVERNMENT LIFE SUPPORT BENEFIT

The Oregon Workers' Compensation system, as set forth in statutes and administrative rules, completely control and govern the operation of the system and the payment of benefits, although the actual day to day administration of the system is performed by private insurance carriers such as Defendant Liberty Northwest. These rules and regulations permit unilateral termination of benefits by the insurer without prior notice or opportunity for hearing.

ORS 656.262 and accompanying regulations govern processing of workers' compensation claims. Once an insurer accepts a claim, ORS 656.210(1) requires payment of time loss (TTD) benefits. This benefit is designed to substitute for income lost resulting from the claimant's disability.

The Workers' Compensation Act and administrative regulations also require notice to the claimant of claim denials or TTD benefit suspensions. See, ORS 656.262(8); OAR 438-05-055. However, where a claim is initially

accepted, and the acceptance is later revoked, ORS 656.262(8) and OAR 436-60-140(6) authorize termination of TTD benefits. Although regulations provide for notice of the revocation of the **claim acceptance,** there is **no** requirement that the insurer notify the claimant of the unilateral termination of the **TTD benefits,** and there is no provision for pre-termination opportunity to be heard. As a result, no procedural safeguards are afforded to the plaintiff, resulting in deprivation of a constitutionally protected interest without due process of law.

The only notice requirements are for either simultaneous or post termination notice which sets forth the only hearing opportunity provided (OAR 438-05-055):

> "IF YOU THINK THIS DENIAL IS NOT RIGHT, WITHIN 60 DAYS AFTER YOU ARE NOTIFIED OF THIS DENIAL YOU MUST FILE A LETTER WITH THE WORKERS' COMPENSATION BOARD, 480 CHURCH STREET, S.E., SALEM OREGON 97310. YOUR LETTER MUST STATE THAT YOU WANT A HEARING, YOUR ADDRESS AND THE DATE OF YOUR ACCIDENT IF YOU KNOW THE DATE. IF YOUR CLAIM QUALIFIES, YOU MAY RECEIVE AN EXPEDITED HEARING WITHIN 30 DAYS. YOUR REQUEST CANNOT BY LAW, AFFECT YOUR EMPLOYMENT. IF YOU DO NOT FILE A REQUEST WITHIN 60 DAYS, YOU WILL LOSE ANY RIGHT YOU MAY HAVE TO COMPENSATION UNLESS YOU CAN SHOW GOOD CAUSE FOR THE DELAY BEYOND 60 DAYS. AFTER 180 DAYS ALL YOUR RIGHTS WILL BE LOST. YOU MAY BE REPRESENTED BY AN ATTORNEY OF YOUR CHOICE AT NO COST TO YOU FOR ATTORNEY FEES."

(NOTE: Mr. Iverson's claim, as is the case with the overwhelming majority of cases, did not qualify for expedited claim service because the Insurer combined the termination with a disclaimer of further responsibility from the claim, an issue which disqualifies the entire matter from expedited claim service. Also, even 30 days to hearing, with an additional thirty days for the Referee to make a decision, and the automatic stay provisions of an appeal by the insurer, still make the system constitutionally inadequate.)

Once the hearing is requested, ORS 656.283(4) allows 90 days for the scheduling of the hearing. Once the hearing is concluded, the Referee has an additional 30 days in which to render an opinion. ORS 656.289(1).

Thereafter, either party can, within another 30 days, appeal the decision to the Workers' Compensation Board. ORS 656.289(3). Filing such an appeal stays the payment of any retroactive time loss payments ordered by the Referee. ORS 656.313. Board review in Oregon can take three months to a year for decision.

Thereafter, the losing party can appeal to the Court of Appeals. ORS 656.298. Once again, the payment of the retroactive benefits are stayed by said appeal. ORS 656.313.

Mr. Iverson appealed his termination on October 17, 1993. He thereafter won at every level. But the Insurer kept appealing each decision, and invoked the automatic stay provisions above. Thus, it was not until Mr. Iverson won the final appeal in the Court of Appeals, on April 14, 1993, that payment of the retroactive terminated benefits was at last made.

At the time this action was filed in Circuit court, only that court could order immediate restoration of the terminated benefits and adoption of rules and procedures guaranteeing notice and due process procedures **prior** to termination of benefits. The Court has subject matter jurisdiction.

The speedy adequate administrative remedy deferred to by the Oregon Civil Courts working in its statutory and regulatory fashion, took 1 1/2 years to provide a remedy.

The Oregon trial court's deferral to this system at the initial phases of Petitioner's action, and the Oregon Supreme Court's refusal to review because by then, benefits had been obtained, conflicts with the well established decisions of this Court that benefits such as Mr. Iverson's Workers' Compensation time loss benefits are entitled to the protection of due process, and, given the nature and purpose of these benefits, such protection requires notice and opportunity to be heard prior to the termination of benefits. The Oregon statutory and administrative scheme is constitutionally defective.

Moreover, payment of retroactive benefits after termination, in Mr. Iverson's case 18 months after termination, is not, and has been held not to be, equivalent to continuation of benefits without interruption.

The decision of the Oregon Supreme Court to uphold Oregon's statutory and administrative scheme outlined above, in the face of the Constitutional challenge brought by Petitioner in the case appealed herein, conflicts with the decisions of the U.S. Supreme Court.

The significance of the rights involved, and the great hardship and suffering visited on Petitioner, and all Oregon Workers' Compensation recipients by virtue of this practice, is a matter of great importance and merits review by this Court.

CONCLUSION

Twenty three years after the U.S. Supreme Court held in *Goldberg v. Kelly*, infra, that recipients of state entitlements are entitled to due process notice and hearings **prior** to termination of benefits, the State of Oregon, through the Department of Insurance and Finance, authorizes termination of Workers' Compensation time loss benefits without any prior due process notice or opportunity to be heard.

So while drunk drivers, even ones who have injured or killed innocent persons, are provided a due process hearing **prior** to license suspension, injured workers receiving time loss benefits can have their benefits terminated without prior notice or hearing. And injured workers must go through procedures after termination that take a minimum of four months, and, as in the case of Mr. Iverson, one and one-half years before said benefits are restored retroactively.

This situation faces injured workers in the State of Oregon on a frequent and regular basis, causing great hardship. **In fact, virtually all of Oregon's procedures for terminating Workers' Compensation benefits provide for only post termination notice and hearing rights. Mr. Iverson's situation is not isolated.**

This situation continues to exist even though it appears to be one which was declared to be unconstitutional in the *Goldberg* case, and those following.

The issues involved are of exceptional importance and of wide-ranging impact.

Petitioner respectfully urges this Court to grant the Petition for Writ of Certiorari.

DATED: December 16, 1993.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF OREGON

ALBERT IVERSON, Plaintiff-Appellant, Petitioner on Review, v. GARY WEEKS, in his official capacity as the Administrator of the Oregon Department of Insurance and Finance, SARA HARMON, in her official capacity as the Administrator of the Workers' Compensation Division, LIBERTY NORTHWEST INSURANCE CORPORATION, Defendants-Respondents, Respondents on Review.	) Marion County) Circuit) Court No. 92-C10247)) ORDER DENYING) REVIEW)) CA A76945) SC S40515

The Court has considered the petition for review and ORDERS that it be denied.

DATE: September 21, 1993

/s/ WALLACE P. CARSON JR.
WALLACE P. CARSON, JR.
CHIEF JUSTICE

c:	Jan Faber	Attorney for Appellant, Petitioner on Review
	Douglas F. Zier	Attorney for Respondents, Respondents on Review, Gary Weeks and Sara Harmon
	Kevin L. Mannix	Attorney for Respondent, Respondent on Review, Liberty Northwest Insurance Corp.

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APPENDIX B

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

ALBERT IVERSON, Plaintiff-Appellant, v. GARY WEEKS, in his official capacity as the Administrator of the Oregon Department of Insurance and Finance, SARA HARMON, in her official capacity as the Administrator of the Workers' Compensation Division, LIBERTY NORTHWEST INSURANCE CORPORATION, Defendants-Respondents.	) Marion County) Circuit) Court No. 92-C10247)) ORDER DENYING) RECONSIDERATION)) CA A76945) SC S40515

The Court of Appeals has considered the Petition for Review filed in this case as a Petition for Reconsideration and has denied the petition. ORAP 9.15. The Supreme Court may now proceed to determine whether to grant review. The appellate court decision is not enforceable until the Supreme Court has completed its review of the petition. ORAP 14.05.

/s/ W. L. RICHARDSON
WILLIAM L. RICHARDSON
CHIEF JUDGE

September 1, 1993
DATE

c:	Jan H. Faber	Attorney for Plaintiff-Appellant
	Douglas F. Zier	Attorney for Defendants-Respondents, Gary Weeks and Sara Harmon
	Kevin L. Mannix	Attorney for Defendants-Respondent, Liberty Northwest Insurance Corp.

S40515.rvd
jk

APPENDIX C

FILED: June 16, 1993

IN THE SUPREME COURT OF THE STATE OF OREGON

ALBERT IVERSON, Appellant, v. GARY WEEKS, in his official capacity as the Administrator of the Oregon Department of Insurance and Finance; SARA HARMON, in her official capacity as the Administrator of the Workers' Compensation Division, LIBERTY NORTHWEST INSURANCE CORPORATION, Respondents.	Marion County Circuit Court No. 92-C10247 CA A76945

Date argued or submitted on briefs: June 3, 1993

Before: Rossman, Presiding Judge, and De Muniz and Leeson, Judges

Attorney for Appellant: Jan H. Faber, Astoria

Attorney for Respondents Weeks and Harmon: Virginia L. Linder, Salem

Attorney for Respondent Liberty Northwest: Kevin L. Mannix, Salem

AFFIRMED WITHOUT OPINION

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondents.

[ ] No costs allowed.

[xx] Costs allowed, payable by: Appellant.

In a case in which a party could be represented by appointed counsel entitled to compensation under ORS 138.500, but the prevailing party is represented by retained counsel or appeared *pro se*, the prevailing party is allowed costs.

APPELLATE JUDGMENT

FILED: June 16, 1993

IN THE COURT OF APPEALS OF THE STATE OF OREGON

ALBERT IVERSON, Appellant, v. GARY WEEKS, in his official capacity as the Administrator of the Oregon Department of Insurance and Finance, SARA HARMON, in her official capacity as the Administrator of the Workers' Compensation Division, LIBERTY NORTHWEST INSURANCE CORPORATION, Respondents.	) Marion County) Circuit) Court No. 92-C10247) CA A76945

Date argued or submitted on briefs: June 3, 1993

Before: Rossman, Presiding Judge, De Muniz and Leeson, Judges

Attorney for Appellant: Jan H. Faber

Attorney for Respondents Weeks and Harmon: Virginia L. Linder

Attorney for Respondent Liberty Northwest: Kevin L. Mannix

AFFIRMED WITHOUT OPINION

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondents
[ ] No costs allowed. [X] Costs allowed, payable by: Appellant

---

MONEY JUDGMENT

Judgment #1

Creditor: GARY WEEKS, in his official capacity as the Administrator of the Oregon Department of Insurance and Finance, SARA HARMON, in her official capacity as the Administrator of the Workers' Compensation Division

Debtor: ALBERT IVERSON
Costs: $160.00
Attorney fees: -0-
TOTAL AMOUNT: $160.00

Interest: Simple, 9% per annum, from the date of this appellate judgment.

MONEY JUDGMENT

Judgment #2

Creditor: LIBERTY NORTHWEST INSURANCE CORPORATION

Debtor: ALBERT IVERSON
Costs: $186.00
Attorney fees: -0-
TOTAL AMOUNT: $186.00

Interest: Simple, 9% per annum, from the date of this appellate judgment.

Appellate Judgment
Effective Date: October 28, 1993

COURT OF APPEALS
(seal)

APPENDIX D

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR MARION COUNTY
MARION COUNTY COURTHOUSE
P.O. Box 12869 Salem, Oregon 97307-0869
(503) 588-5228

September 23, 1992

Jan H Faber
Attorney at Law Bar#: 86033
3015 Harrison
Astoria OR 97103

Iverson Albert/Weeks Gary
Case#: 92C10247 Civil Administrative Order

NOTICE OF ENTRY OF JUDGMENT

A Judgment by Court was entered in the register of the CIRCUIT Court in the above-noted case on September 22, 1992.

Judgment was docketed in the CIRCUIT Court judgment docket.

A copy of the judgment docket entry for this case is enclosed with this notice.

This notice is sent in accordance with ORCP 70B.

Client(s) of Addressee:
Albert Iverson

CC:
Kendall M Barnes
Kevin L Mannix

LS 9/22/92 10:47 AM
Status Closed INAC

Case#. . . . 92C10247

Marion County Circuit Court
Iverson Albert/Weeks Gary
Civil Administrative Order

---

1 Judgment
Docket Entry Date.....9/22/92
Judgment Date 9/21/92
Jgm Court Costs.....$122.25
Judgment Status.....Unsatisfd
Docket Entry Time .....10:39 AM
Volume/Page .....OJIN

Costs awarded to Gary Weeks & Sara Harmon and against Ptf are not filled in

PTY_____JGMT ROLE_____PLAINTIFF_____ROLE_____
JUDGMENT STATUS
1 Plaintiff IVERSON ALBERT Debtor Unsatisfied

PTY_____JGMT ROLE_____DEFENDANT_____ROLE_____
JUDGMENT STATUS
5 Defendant LIBERTY NORTHWEST INSURANCE CO Creditor

EVT_ENTER DT_FILE DT_EVENT/FILING/PROCEEDING_____SCD DT_____TIME_____
34 9/22/92 9/21/92 Judgment
9/18/92 Signed
CJU 1 Miller Rodney
Related event # 36
******** END OF DATA ********

APPENDIX E

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

ALBERT IVERSON, Plaintiff, **v.** **GARY WEEKS, in his official capacity as the administrator of THE OREGON DEPARTMENT OF INSURANCE AND FINANCE, SARA HARMON, in her official capacity as the Administrator of the WORKERS' COMPENSATION DIVISION, and LIBERTY NORTHWEST INSURANCE CORPORATION, an Oregon Corporation,** Defendants.	Case No. 92-C 10247 **ORDER** (Filed Sep. 21, 1992)

The court having heard argument and being fully advised in the premises as to the motion of defendant Liberty Northwest Insurance Corporation to Dismiss the plaintiff's complaint for lack of subject matter jurisdiction, it is

ORDERED that the motion is allowed.

DATED this 18 day of September, 1992.

/s/ Rodney W. Miller
RODNEY W. Miller
Circuit Court Judge

Submitted by:
Kevin L. Mannix
Of Attorneys for Defendant Liberty Northwest Insurance Corporation

ORDER – 1

APPENDIX F

CIRCUIT COURT OF OREGON
MARION COUNTY

ALBERT IVERSON, Plaintiff, v. GARY WEEKS, in his official capacity as the administrator of the OREGON DEPARTMENT OF INSURANCE AND FINANCE, SARA HARMON, in her official capacity as the administrator of the WORKER'S COMPENSATION DIVISION, LIBERTY NORTHWEST and Oregon Corporation, Defendants.	) No. 92-C 10247) ORDER

The motions of defendants Weeks and Harmon to dismiss or make more definite and certain were heard by the Court on May 28, 1992. Defendants Weeks and Harmon were represented by Kendall M. Barnes, Assistant Attorney General. Plaintiff was represented by Jan H. Faber. Defendant Liberty Northwest was represented by Kevin L. Mannix. Having considered the arguments and memoranda of the parties, and being fully advised in the premises, it is

ORDERED that the first motion of defendants Weeks and Harmon to dismiss for lack of subject matter jurisdiction over plaintiff's workers' compensation claim is allowed; and it is

FURTHER ORDERED that the remaining motions filed by defendants Weeks and Harmon are moot.

DATED this 22 day of June, 1992.

/s/ _____
RODNEY W. MILLER
Circuit Court Judge

Submitted by
Kendall M. Barnes

Of Attorneys for Defendants Week and Harmon

APPENDIX G

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR MARION COUNTY
MARION COUNTY COURTHOUSE
P.O. Box 12869 Salem, Oregon 97307-0869
(503) 588-5228

November 4, 1993

Jan H Faber
Attorney at Law Bar#: 86033
C/O PAT LAVIS, P.C.
1139 EXCHANGE ST
ASTORIA OR 97103
Iverson Albert/Gary Weeks Administrator
Case#: 92C10247 Civil Administrative Order

NOTICE OF ENTRY OF JUDGMENT

A Judgment by Court was entered in the register of the CIRCUIT Court in the above-noted case on November 3, 1993.

Order Dismissed on Appeal was docketed in the CIRCUIT Court judgment docket.

A copy of the judgment docket entry for this case is enclosed with this notice.

This notice is sent in accordance with ORCP 70B.

Client(s) of Addressee:
Albert Iverson

CC:
Kendall M Barnes
Kevin L Mannix

LS 11/03/93 2:39 PM
Status Closed INAC

Case#...92C10247
Marion County Circuit Court
Iverson Albert/Gary Weeks Administrator
Civil Administrative Order

---

1 Judgment

Docket Entry Date.....	9/22/92
Judgment Date.....	9/21/92
Jgm Court Costs.....	$122.25
Judgment Status.....	**Unsatisfd**
Docket Entry Time.....	10:39 AM
Volume/Page.....	OJIN

Costs awarded to Gary Weeks & Sara Harmon and against Ptf are not filled in

PTY	JGMT ROLE	PLAINTIFF	ROLE	JUDGMENT STATUS
1	Plaintiff	IVERSON ALBERT	Debtor	Unsatisfied

PTY	JGMT ROLE	DEFENDANT	ROLE	JUDGMENT STATUS
5	Defendant	LIBERTY NORTHWEST INSURANCE CO	Creditor	

EVT	ENTER DT	FILE DT	EVENT/FILING/PROCEEDING	SCD DT	TIME
34	9/22/92	9/21/92	Judgment		
		9/18/92	Signed		
			CJU 1 Miller Rodney		
			Related event # 36		
38	11/24/92	11/23/92	Notice Appeal		
			PTF 1 Iverson Albert		

2 Jgm Enforce Appellate Judgmen
Docket Entry Date..... 11/03/93
Judgment Date..... 11/02/93
Jgm Court Costs..... $186.00
Creditor Liberty Northwest Insurance Co Defendant
Debtor Iverson Albert Plaintiff
Jgm Court Costs..... $160.00

Judgment Status..... Unsatisfd
Docket Entry Time..... 2:36 PM
Volume/Page..... OJIN

PTY_____JGMT ROLE_____PLAINTIFF_____ROLE_____
JUDGMENT STATUS
1 Plaintiff IVERSON ALBERT Debtor

PTY____JGMT ROLE_____DEFENDANT_____ROLE_____
JUDGMENT STATUS
1 Defendant GARY WEEKS ADMINISTRATOR Creditor
2 Defendant OREGON DEPARTMENT OF INSURANCE Creditor
3 Defendant SARA HARMON ADMINISTRATOR Creditor
4 Defendant WORKERS' COMPENSATION DIVISION Creditor

EVT____ENTER DT____FILE DT____EVENT/FILING/
PROCEEDING_____SCD DT_____TIME_____
41 11/03/93 11/02/93 Order Affirming on Appeal
Related event # 42

******** END OF DATA ********

APPENDIX H

* * *

656.283 Hearing rights and procedure; modification of vocational assistance actions; use of standards for evaluation of disability. (1) Subject to subsection (2) of this section and ORS 656.319, any party or the director may at any time request a hearing on any question concerning a claim.

(2) If a worker is dissatisfied with an action of the insurer or self-insured employer regarding vocational assistance, the worker must first apply to the director for administrative review of the matter before requesting a hearing on that matter. Such application must be made not later than the 60th day after the date the worker was notified of the action. The director shall complete the review within a reasonable time, unless the worker's dissatisfaction is otherwise resolved. The decision of the director may be modified only if it:

(a) Violates a statute or rule;

(b) Exceeds the statutory authority of the agency;

(c) Was made upon unlawful procedure; or

(d) Was characterized by abuse of discretion or clearly unwarranted exercise of discretion.

(3) A request for hearing may be made by any writing, signed by or on behalf of the party and including the address of the party, requesting the hearing, stating that a hearing is desired, and mailed to the board.

(4) The board shall refer the request for hearing to a referee for determination as expeditiously as possible.

The hearing shall be scheduled for a date not more than 90 days after receipt by the board of the request for hearing. The hearing shall not be postponed except in extraordinary circumstances beyond the control of the requesting party.

(5) At least 10 days' prior notice of the time and place of hearing shall be given to all parties in interest by mail. Hearings shall be held in the county where the worker resided at the time of the injury or such other place selected by the referee.

(6) A record of all proceedings at the hearing shall be kept but need not be transcribed unless a party requests a review of the order of the referee. Transcription shall be in written form as provided by ORS 656.295 (3).

(7) Except as otherwise provided in this section and rules of procedure established by the board, the referee is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, and may conduct the hearing in any manner that will achieve substantial justice. Evaluation of the worker's disability by the referee shall be as of the date of issuance of the reconsideration order pursuant to ORS 656.268. Any finding of fact regarding the worker's impairment must be established by medical evidence that is supported by objective findings. The referee shall apply to the hearing of the claim such standards for evaluation of disability as may be adopted by the director pursuant to ORS 656.726. Nothing in this section shall be construed to prevent or limit the right of a worker, insurer or self-insured employer to present evidence at hearing and to establish

by a preponderance of the evidence that the standards adopted pursuant to ORS 656.726 for evaluation of the worker's permanent disability were incorrectly applied in the reconsideration order pursuant to ORS 656.268. If the referee finds that the claim has been closed prematurely, the referee shall issue an order rescinding the determination order or notice of closure.

(8) Any party shall be entitled to issuance and service of subpoenas under the provisions of ORS 656.726 (2)(c). Any party or representative of the party may serve such subpoenas.

(9) After a party requests a hearing and before the hearing commences, the board, by rule, may require the requesting party, if represented by an attorney, to notify the referee in writing that the attorney has conferred with the other party and that settlement has been achieved, subject to board approval, or that settlement cannot be achieved.

* * *

656.289 Orders of referee; review; disposition of claim when compensability disputed; approval of director required for reimbursement from certain reserves. (1) Upon the conclusion of any hearing, or prior thereto with concurrence of the parties, the referee shall promptly and not later than 30 days after the hearing determine the matter and make an order in accordance with the referee's determination.

(2) A copy of the order shall be sent forthwith by mail to the director and to all parties in interest.

(3) The order is final unless, within 30 days after the date on which a copy of the order is mailed to the parties, one of the parties requests a review by the board under ORS 656.295. When one party requests a review by the board, the other party or parties shall have the remainder of the 30-day period and in no case less than 10 days in which to request board review in the same manner. The 10-day requirement may carry the period of time allowed for requests for board reviews beyond the 30th day. The order shall contain a statement explaining the rights of the parties under this subsection and ORS 656.295.

(4) Notwithstanding ORS 656.236, in any case where there is a bona fide dispute over compensability of a claim, the parties may, with the approval of a referee, the board or the court, by agreement make such disposition of the claim as is considered reasonable.

(5) Any claim in which the parties enter into a disposition under subsection (4) of this section shall not be eligible for reimbursement from the Reemployment Assistance Reserve, the Handicapped Workers Reserve, the Reopened Claims Reserve or the Retroactive Reserve without the prior approval of the director. [1965 c.285 §35; 1969 c.212 §1; 1977 c.804 §9; 1983 c.809 §3; 1990 c.2 §21]

656.290 [Amended by 1955 c.718 §3; repealed by 1965 c.285 §95]

656.291 Expedited Claim Service; jurisdiction; procedure; representation. (1) The board, by rule, shall establish an Expedited Claim Service to provide for prompt, informal disposition of claims.

(2) The Board shall assign to the service these claims:

(a) For which a hearing has been requested when the only matters unresolved do not include compensability of the claim and the amount in controversy is $1,000 or less; or

(b) For which the only matters unresolved are attorney fees or penalties.

(3)(a) The amount in controversy shall be deemed less than $1,000 if the party requesting hearing so indicates, the other party does not disagree and the referee does not conclude, based on the evidence, that the amount in controversy exceeds $1,000. In a case assigned pursuant to paragraph (a) of subsection (2) of this section, if the referee finds that the amount in controversy exceeds $1,000, the referee shall refer the case for disposition under the ordinary hearing process.

(b) Cases assigned to the Expedited Claim Service pursuant to paragraph (a) of subsection (2) of this section shall be heard within 30 days of the request for hearing, and an order shall be issued within 10 days of the close of the hearing.

(c) No hearing shall be held in cases assigned to the Expedited Claim Service pursuant to paragraph (b) of subsection (2) of this section unless the referee finds that the dispute cannot be decided on stipulated facts.

* * *

656.313 Stay of compensation pending request for hearing or board or court review; procedure for denial of claim for medical services. (1)(a) filing by an employer or

the insurer of a request for hearing on a reconsideration order or a request for board review or court appeal stays payment of the compensation appealed . . .

* * *

656.262 Processing of claims and payment of compensation; payment by employer; acceptance and denial of claim; reporting claims; penalty for unreasonable payment delay. (1) Processing of claims and providing compensation for a worker shall be the responsibility of the insurer or self-insured employer. All employers shall assist their insurers in processing claims as required in this chapter.

(2) The compensation due under this chapter shall be paid periodically, promptly and directly to the person entitled thereto upon the employer's receiving notice or knowledge of a claim, except where the right to compensation is denied by the insurer or self-insured employer.

(3) Employers shall, immediately and not later than five days after notice or knowledge of any claims or accidents which may result in a compensable injury claim, report the same to their insurer. The report shall include:

(a) The date, time, cause and nature of the accident and injuries.

(b) Whether the accident arose out of and in the course of employment.

(c) Whether the employer recommends or opposes acceptance of the claim, and the reasons therefor.

(d) The name and address of any health insurance provider for the injured worker.

(e) Any other details the insurer may require.

Failure to so report subjects the offending employer to a charge for reimbursing the insurer for any penalty the insurer is required to pay under subsection (10) of this section because of such failure. As used in this subsection, "health insurance" has the meaning for that term provided in ORS 731.162.

(4)(a) The first installment of compensation shall be paid no later than the 14th day after the subject employer has notice or knowledge of the claim. Thereafter, compensation shall be paid at least once each two weeks, except where the director determines that payment in installments should be made at some other interval. The director may be rule convert monthly benefit schedules to weekly or other periodic schedules.

(b) Temporary disability compensation is not due and payable for any period of time for which the insurer or self-insured employer has requested from the worker's attending physician verification of the worker's inability to work resulting from the claimed injury or disease and the physician cannot verify the worker's inability to work, unless the worker has been unable to receive treatment for reasons beyond the worker's control.

(c) If a worker fails to appear at an appointment with the worker's attending physician, the insurer or self-insured employer shall notify the worker by certified mail that temporary disability benefits may be suspended

after the worker fails to appear at a rescheduled appointment. If the worker fails to appear at a rescheduled appointment, the insurer or self-insured employer may suspend payment of temporary disability benefits to the worker until the worker appears at a subsequent rescheduled appointment.

(d) If the insurer or self-insured employer has requested and failed to receive from the worker's attending physician verification of the worker's inability to work resulting from the claimed injury or disease, medical services provided by the attending physician are not compensable until the attending physician submits such verification.

(5) Payment of compensation under subsection (4) of this section or payment, in amounts not to exceed $500 per claim, for medical services for nondisabling claims, may be made by the subject employer if the employer so chooses. The making of such payments does not constitute a waiver or transfer of the insurer's duty to determine entitlement to benefits. If the employer chooses to make such payment, the employer shall report the injury to the insurer in the same manner that other injuries are reported. However, an insurer shall not modify an employer's experience rating or otherwise make charges against the employer for any medical expenses paid by the employer pursuant to this subsection.

(6) Written notice of acceptance or denial of the claim shall be furnished to the claimant by the insurer or self-insured employer within 90 days after the employer has notice or knowledge of the claim. However, if the insurer or self-insured employer accepts a claim in good

faith but later obtains evidence that the claim is not compensable or evidence that the paying agent is not responsible for the claim, the insurer or self-insured employer, at any time up to two years from the date of claim acceptance, may revoke the claim acceptance and issue a formal notice of claim denial. However, if the worker requests a hearing on such denial, the insurer or self-insured employer must prove by clear and convincing evidence that the claim is not compensable or that the paying agent is not responsible for the claim. Notwithstanding any other provisions of this chapter, if a denial of a previously accepted claim is set aside by a referee, the board or the court, temporary total disability benefits are payable from the date any such benefits were terminated under the denial. Pending acceptance or denial of a claim, compensation payable to a claimant does not include the costs of medical benefits or burial expenses. The insurer shall also furnish the employer a copy of the notice of acceptance. The notice of acceptance shall:

(a) Specify what conditions are compensable.

(b) Advise the claimant whether the claim is considered disabling or nondisabling.

(c) Inform the claimant of the Expedited Claim Service, of hearing and aggravation rights concerning nondisabling injuries, including the right to object to a decision that the injury of the claimant is nondisabling by requesting a determination thereon pursuant to ORS 656.268 within one year of the date of injury.

(d) Inform the claimant of employment reinstatement rights and responsibilities under ORS chapter 659.

(e) Inform the claimant of assistance available to employers from the Reemployment Assistance Reserve under ORS 656.622.

(7) The State Accident Insurance Fund Corporation in processing claims under ORS 656.054 shall send notice of acceptance or denial to the noncomplying employer.

(8) If an insurer or any other duly authorized agent of the employer for such purpose, on record with the Director of the Department of Insurance and Finance denies a claim for compensation, written notice of such denial, stating the reason for the denial, and informing the worker of the Expedited Claim Service and of hearing rights under ORS 656.283, shall be given to the claimant. A copy of the notice of denial shall be mailed to the director and to the employer by the insurer. The worker may request a hearing pursuant to ORS 656.319.

(9) Merely paying or providing compensation shall not be considered acceptance of a claim or an admission of liability, nor shall mere acceptance of such compensation be considered a waiver of the right to question the amount thereof.

* * *

656.210 Temporary total disability; payment during medical treatment. (1) When the total disability is only temporary, the worker shall receive during the period of that total disability compensation equal to 66-2/3 percent of wages, but not more than 100 percent of the average weekly wage nor less than the amount of 90 percent of wages a week or the amount of $50 a week, whichever amount is lesser. Notwithstanding the limitation imposed

by this subsection, an injured worker who is not otherwise eligible to receive an increase in benefits for the fiscal year in which compensation is paid shall have the benefits increased each fiscal year by the percentage which the applicable average weekly wage has increased since the previous fiscal year.

* * *

JUDICIAL REVIEW

183.480 Judicial review of agency orders. (1) Any person adversely affected or aggrieved by an order or any party to an agency proceeding is entitled to judicial review of a final order, whether such order is affirmative or negative in form. A petition for rehearing or reconsideration need not be filed as a condition of judicial review unless specifically otherwise provided by statute or agency rule.

(2) Judicial review of final orders of agencies shall be solely as provided by ORS 183.482, 183.484, 183.490 and 183.500.

(3) No action or suit shall be maintained as to the validity of any agency order except a final order as provided in this section and ORS 183.482, 183.484, 183.490 and 183.500 or except upon showing that the agency is proceeding without probable cause, or that the party will suffer substantial and irreparable harm if interlocutory relief is not granted.

(4) Judicial review of orders issued pursuant to ORS 813.410 shall be as provided by ORS 813.410. [1957 c.717

§ 12; 1963 c.449 § 1; 1971 c.734 § 18; 1975 c.759 § 14; 1979 c.593 § 23; 1983 c.338 § 901; 1985 c.757 § 4]

* * *

183.490 Agency may be compelled to act. The court may, upon petition as described in ORS 183.484, compel an agency to act where it has unlawfully refused to act or make a decision or unreasonably delayed taking action or making a decision. [1957 c.717 § 13; 1979 c.593 § 28]

183.495 [1975 c.759 § 16a; repealed by 1985 c.757 § 7]

* * *

APPENDIX I

DIVISION 13

EXPEDITED CLAIMS SERVICE

438-13-005 EXPEDITED CLAIMS SERVICE ESTABLISHED.

Pursuant to the mandate of 1987 Or Laws, c. 884, sec. 18, there is established within the Hearing Division the Expedited Claims Service. The purpose of the Expedited Claims Service is to provide for prompt, informal dispute resolution and to insure fair and just treatment of workers in all proceedings.

438-13-010 REFERRAL OF REQUEST FOR HEARING TO EXPEDITED CLAIMS SERVICE.

(1) A request for hearing shall be referred to the expedited Claims Service if:

(a) The request does not involve the compensability of or responsibility for a claim, and the total amount in controversy, exclusive of penalties and/or related attorney fees, is $1,000 or less, or

(b) The only issue in the case is entitlement to penalties and/or related attorney fees.

(2) If a referee finds at the hearing or at any time prior to the hearing that the case should not have been referred to the Expedited Claims Service, the referee shall refer the case for decision under the ordinary hearing process. With the consent of the referee, the parties may agree on the oral record to proceed with the hearing as referred to the ordinary hearing process without further delay. Such an agreement to proceed is a waiver of any claim of defect as to notice of hearing or issues.

438-13-015 DETERMINATION OF AMOUNT IN CONTROVERSY.

For the purpose of referral to the Expedited Claims Service, the total amount in controversy shall be presumed to be $1,000 or less if the party requesting the hearing so states on a form prescribed by the Board or in the request for hearing.

438-13-020 REPRESENTATION OF PARTIES IN EXPEDITED CLAIMS.

(1) A claimant need not be represented by any other person in proceedings before the Expedited Claims Service.

438-05-055 NOTICE OF CLAIM DENIAL AND HEARING RIGHTS.

In addition to the requirements of ORS 656.262, the notice of denial shall specify the factual and legal reasons for denial and shall contain a notice, in prominent or bold-face type, as follows:

> "IF YOU THINK THIS DENIAL IS NOT RIGHT, WITHIN 60 DAYS AFTER *YOU ARE NOTIFIED OF THIS DENIAL* [THE DATE OF THIS LETTER] YOU MUST FILE A LETTER WITH THE WORKERS' COMPENSATION BOARD, 480 CHURCH STREET, S.E., SALEM OREGON 97310. YOUR LETTER MUST STATE THAT YOU WANT A HEARING, YOUR ADDRESS AND DATE OF YOUR ACCIDENT IF YOU KNOW THE DATE. IF YOUR CLAIM QUALIFIES, YOU MAY RECEIVE AN EXPEDITED HEARING WITHIN 30 DAYS. YOUR REQUEST CANNOT, BY LAW, AFFECT YOUR EMPLOYMENT. IF YOU DO NOT FILE A REQUEST WITHIN 60 DAYS, YOU WILL LOSE

ANY RIGHT YOU MAY HAVE TO COMPENSATION UNLESS YOU CAN SHOW GOOD CAUSE FOR DELAY BEYOND 60 DAYS. AFTER 180 DAYS ALL YOUR RIGHTS WILL BE LOST. YOU MAY BE REPRESENTED BY AN ATTORNEY OF YOUR CHOICE AT NO COST TO YOU FOR ATTORNEY FEES."

438-05-060 NOTICE OF PARTIAL DENIAL AND HEARING RIGHTS.

Every notice of partial denial shall set forth with particularity the injury, condition, benefit or service for which liability is denied and the factual and legal reasons therefor. The notice shall be in the form specified by 438-05-055.

438-05-065 MANNER OF GIVING NOTICE.

Notice of denial or other notice from which statutory time runs against a claim shall be in writing and shall be delivered by registered or certified mail with return receipt requested or by personal service meeting the requirements for service of a summons.

438-05-070 REQUEST FOR HEARING.

Proceedings before the Hearings Division are begun by filing a request for hearing meeting the requirements of ORS 656.283. The request for hearing should be on a form prescribed by the Board. In addition to the information required by ORS 656.283(3), the person requesting a hearing should include the person's full name, the name of the injured worker if different from that of the person requesting the hearing, the injured worker's social security account number, the date of the injury or exposure, the name of the employer and its insurer, if any, and the

claim number. A copy of the request should be mailed to the insurer or self-insured employer.

438-05-075 DUTY TO FORWARD MISDIRECTED REQUEST.

If a claimant sends a request for hearing or Board review to the employer or insurer, the employer or insurer shall promptly forward the request to the Board.

CHAPTER 436
DEPARTMENT OF INSURANCE AND FINANCE
WORKERS' COMPENSATION DIVISION

ACCEPTANCE OR DENIAL OF A CLAIM

436-60-140 (1) The insurer is required to conduct a "reasonable" investigation based on all available information in ascertaining whether to deny a claim. A reasonable investigation is whatever steps a reasonably prudent person with knowledge of the legal standards for determining compensability would take in a good faith effort to ascertain the facts underlying a claim, giving due consideration to the cost of the investigation and the likely value of the claim.

(2) In determining whether an investigation is reasonable, the director will only look at information contained in the insurer's claim record at the time of denial. The insurer may not rely on any fact not documented in the claim record at the time of denial to establish that an investigation was reasonable.

(3) The insurer shall give the claimant written notice of acceptance or denial of a claim within (90) days of the employer's notice or knowledge of the claim.

(4) The director may assess a penalty against any insurer delinquent in accepting or denying a claim beyond the (90) days prescribed in ORS 656.262 in excess of 5 percent of their total volume of reported disabling claims during any quarter.

(5) The notice of acceptance shall comply with ORS 656.262 and the rules of Practice and Procedure for Contested Cases under the Workers' Compensation Law. It shall specify to the worker:

(a) What conditions are compensable;

(b) Whether the claim is disabling or nondisabling;

(c) Of the Expedited Claim Service, of hearing and aggravation rights concerning nondisabling injuries including the right to object to a decision that the injury is nondisabling by requesting a determination pursuant to ORS 656.268 within one year of the date of injury;

(d) Of the employment reinstatement rights and responsibilities under ORS Chapter 659;

(e) Of assistance available to employers from the Reemployment Assistance Reserve under ORS 656.622; and

(f) That expenses personally paid for claim related expenses up to a maximum established rate shall be reimbursed by the insurer when requested in writing and accompanied by sales slips, receipts, or other reasonable written support, for meals, lodging, transportation, prescriptions and other related expenses.

(6) The notice of denial shall comply with the rules of Practice and Procedure for Contested Cases under the Workers' Compensation Law and shall:

(a) Specify the factual and legal reasons for the denial; and

(b) Inform the worker of the Expedited Claim Service and of the worker's right to a hearing under ORS 656.283.

(7) The insurer shall send notice of the denial to each provider of medical services and health insurance when compensability of any portion of a claim for medical services is denied. When compensability of the claim has been finally determined or when disposition of the claim has been made, the insurer shall notify each affected service provider of the results of the determination or disposition. The notification shall include the results of the proceedings under ORS 656.236 or 656.289(4) and the amount of any settlement.

* * *

Supreme Court, U.S.
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(2)

No. 93-968

In the Supreme Court of the United States

OCTOBER TERM, 1993

ALBERT IVERSON,

Petitioner,

v.

GARY WEEKS, in his official capacity as the Administrator of THE OREGON DEPARTMENT OF INSURANCE AND FINANCE, SARA HARMON, in her official capacity as the Administrator of the WORKERS' COMPENSATION DIVISION, LIBERTY NORTHWEST INSURANCE COMPANY, an Oregon corporation,

Respondents.

On Petition for Writ of Certiorari to the Oregon Supreme Court

BRIEF IN OPPOSITION FOR RESPONDENTS WEEKS and HARMON

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QUESTIONS PRESENTED

Assuming the lower courts had decided petitioner's federal constitutional claim, the questions presented would be:

Under a regulated state workers' compensation system, does the action of a private insurance company in terminating workers' compensation benefits to an individual constitute "state action," such that the private insurer is required under the Due Process Clause to provide the individual with pre-termination notice and an opportunity to be heard?

When the State regulates the provision of, but does not directly provide, workers' compensation benefits to injured workers, is it required under the Due Process Clause to mandate that participating private insurance companies provide notice and an opportunity to be heard to individuals receiving workers' compensation benefits before private insurers may terminate the benefits?

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BRIEF IN OPPOSITION FOR RESPONDENTS WEEKS and HARMON

STATEMENT OF THE CASE

Respondents Weeks and Harmon generally accept petitioner's statement of the case, except as set forth below.

Petitioner sustained a knee injury on the job on December 6, 1990. Respondent Liberty Northwest Insurance Company accepted petitioner's workers' compensation claim on August 23, 1991, and petitioner began receiving "time loss" benefits. On October 8, 1991, Liberty Northwest, in a letter to petitioner, informed petitioner that it was denying further responsibility on

petitioner's knee injury claim. Liberty Northwest then discontinued payment of petitioner's time loss benefits.

Petitioner filed a claim with the hearings referee of the Oregon Workers' Compensation Board seeking an order directing Liberty Northwest to resume payment of time loss benefits and payment of the time loss benefits that petitioner claimed Liberty Northwest should have paid from October 8th forward. On May 29, 1992, the referee ordered Liberty Northwest to resume paying time loss benefits and, starting on that date, petitioner again began receiving those benefits. The referee also ordered Liberty Northwest to pay the time loss benefits for the period of October 8, 1991 to May 29, 1992. However, because Liberty Northwest sought review of the referee's decision before the Workers' Compensation Board, and then appealed the board's decision to the Oregon Court of Appeals, the portion of the order requiring repayment of the suspended time loss benefits was stayed.

On February 10, 1992, while the identical claim was pending before the hearings referee, petitioner filed a complaint in the circuit court asking that respondent Liberty Northwest be ordered to resume payment of time loss benefits and to repay suspended time loss benefits. Petitioner's complaint also asked that the court order respondents Weeks and Harmon to

> [a]fford plaintiff an opportunity to be heard, by way of full evidentiary hearing, on the issue of compensability before termination of temporary total disability benefits;
>
> [s]uspend enforcement of regulations and statutes authorizing unilateral termination of temporary total disability benefits without notice to claimant or an opportunity to be heard.

Respondents Weeks and Harmon moved to dismiss petitioner's complaint, arguing, *inter alia*, that under Oregon law, the

circuit court lacked subject matter jurisdiction of the complaint because exclusive jurisdiction to resolve the question whether Liberty Northwest properly terminated petitioner's time loss benefits resided with the Oregon Workers' Compensation Board.[1]

The circuit court entered its order granting respondents' motion to dismiss on June 4, 1992. The order recited

> that the first motion of defendants Weeks and Harmon to dismiss for lack of subject matter jurisdiction over plaintiff's workers' compensation claim is allowed; and it is
>
> FURTHER ORDERED that the remaining motions filed by defendants Weeks and Harmon are moot.

The judgment of dismissal was entered on September 22, 1992.[2]

REASONS FOR DENYING REVIEW

Petitioner claims that the courts below "decided a federal question in a way that conflicts with the decision of another state court of last resort, or of a Federal Court of Appeals." Pet. Cert. 8. He further claims that the courts below "decided an important question of federal law." *Id.* At page ii, petitioner asserts:

> * * * the Oregon Circuit Court dismissed Mr. Iverson's complaint, agreeing with Defendants' arguments that the post termination procedures provided by the State of Oregon were constitutionally adequate.

---

[1]Respondents Weeks and Harmon also moved to dismiss the complaint on the basis that the complaint failed to state a claim entitling plaintiff to relief. Respondents argued that the facts pleaded in the complaint gave rise to no constitutional obligation on respondents' part to require private insurers to provide notice and an opportunity to be heard before terminating benefits.

[2]This chronology clearly shows that petitioner is wrong in his assertion, Pet. Cert. at 6, that the circuit court dismissed plaintiff's complaint on jurisdictional grounds before the referee had issued his decision.

At page iii, petitioner further asserts:

> In refusing to review this matter, the Oregon Supreme Court has held that the State of Oregon is not required by the due process clause of the Fifth and Fourteenth Amendments to provide recipients of Workers' Compensation time loss benefits notice and opportunity for a hearing prior to the termination of their benefits.

Petitioner misrepresents the nature of the issue the courts decided below. As is clear from the circuit court's judgment, Pet. Cert. App. F1-2, the trial court decided no federal question because it did not reach the merits of petitioner's due process contention. Rather, the circuit court dismissed the complaint "for lack of subject matter jurisdiction over plaintiff's workers' compensation claim." *See also* Pet. Cert. App. E1-2 (order granting respondent Liberty Northwest's motion "to dismiss the plaintiff's complaint for lack of subject matter jurisdiction.")

Nor did the appellate courts decide a federal question. Petitioner's first assignment of error in his brief in the Oregon Court of Appeals was that "[t]he trial court erred in holding that the court lacked subject matter jurisdiction over the cause of action stated in plaintiff's complaint." Petitioner's Brief and Abstract of Record, p. 5 (filed in the Oregon Court of Appeals). The Oregon Court of Appeals affirmed the trial court's judgment without opinion, thereby rejecting petitioner's subject matter jurisdiction argument. The Oregon Supreme Court denied review without opinion. Pet. Cert. App. C-1; A-1. Necessarily, then, the Oregon circuit court and the Oregon appellate courts did not reach the merits of petitioner's constitutional challenge, which the circuit court had deemed moot in light of its dismissal of petitioner's complaint on jurisdictional grounds.

Whether the Oregon circuit court had subject matter jurisdiction to entertain petitioner's constitutional challenge is purely a question of state law. Petitioner attempted to invoke Or. Rev. Stat. § 183.490, a generic statutory mandamus proceeding by which a party may ask a court to compel an agency to act where it has unlawfully failed or refused to act. However, in matters pertaining to workers' compensation, Oregon courts routinely have held that the remedies provided under the workers' compensation statutes are exclusive of all other remedies. *See, e.g., SAIF v. Johnson*, 99 Or. App. 64, 67, 781 P.2d 374 (1989), *rev. denied*, 309 Or. 334 (1990) (stating that the court "repeatedly [has] held that the circuit courts lack jurisdiction to consider matters concerning workers' compensation claims and that the decisional and review provisions of the Workers' Compensation Law are exclusive [citing cases]."). Respondents Weeks and Harmon argued below that under this line of cases, petitioner could not maintain an action against them under Or. Rev. Stat. § 183.490. The circuit court agreed and dismissed the complaint; the appellate courts affirmed.

Petitioner makes no attempt to argue that the lower courts were wrong in concluding that petitioner's action was cognizable under Oregon's workers' compensation statutes. Under petitioner's theory of "state action," respondent Liberty Northwest is a state actor because the workers' compensation system in Oregon is heavily regulated at the state level, and all private insurance companies such as Liberty Northwest effectively act as agents of the State for state action purposes.[3] Assuming petitioner were

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[3]The arguments presented in the petition for writ of certiorari are less than sharp and precise. However, in his petition for review to the Oregon Supreme Court, petitioner made his position on this point clear:

(continued...)

correct in this novel proposition, petitioner could have argued before the workers' compensation hearings referee that Liberty Northwest's termination of his time loss benefits without prior notice and an opportunity for a pre-termination hearing violated due process. Had the referee agreed with petitioner, petitioner would have been entitled to repayment of the withheld benefits. Petitioner's constitutional claim clearly involves a matter concerning a workers' compensation claim over which the workers' compensation system, not the state circuit courts, have exclusive jurisdiction in the first instance.[4]

Even if petitioner were correct on the purely state law question of which forum he must use to present his claim, it does not follow that the issue has sufficient importance to merit granting certiorari. As of April, 1993, petitioner had been repaid the eight months of suspended time loss benefits. Pet. Cert. 16. Were this Court to conclude that the lower courts erred in dismissing petitioner's complaint, the appropriate result would be to remand this matter to the state courts to consider petitioner's constitutional claim in the first instance. The state circuit court, however, would have no choice but to dismiss petitioner's complaint as moot. Oregon courts adhere strictly to the requirement that, to be justiciable, a claim must involve a live controversy. Oregon does not recognize any exceptions, such as claims

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[3](...continued)

> The actions complained of in the action below, both of the State Defendants and of Liberty Northwest, were those provided for and established by State laws and regulations, and thus are state action for purposes of the complaint filed by Mr. Iverson.

Pet. Rev. 4.

[4]Judicial review of workers' compensation claim decisions is available in the Court of Appeals. Or. Rev. Stat. § 656.298.

that are capable of repetition yet evading review, or claims that, while not live, are of sufficient public importance that review nevertheless is warranted. *See, e.g., Hay v. Dept. of Transportation*, 301 Or. 129, 134, 719 P.2d 860 (1986) (rejecting contention that judicial review of a temporary rule that had expired is not moot because the agency might readopt the rule, and dismissing the rule challenge as moot); *State ex rel. Oregonian Publishing Co. v. Sams*, 298 Or. 329, 332, 692 P.2d 116 (1984) (noting "that this court has not in recent years accepted the view that it is a proper judicial function to render a legal opinion 'in the public interest' when there is no concrete underlying dispute to be decided.")

Finally, petitioner's "state action" claim is wholly without merit under this Court's line of precedents. Petitioner does not cite a single case from this or any other court that supports its claim that the action of a private insurance carrier denying or terminating benefits equals "state action" under the Due Process Clause. Nor does petitioner cite any authority for the proposition that State respondents Weeks and Harmon, acting in their official capacity, are constitutionally required to compel private insurance carriers that provide workers' compensation benefits to private individuals under a state-regulated workers' compensation program to give their insureds notice and an opportunity to be heard prior to the private insurance companies deciding to terminate benefits. Indeed, this Court's precedents are to the contrary. *See, e.g., Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1975) (actions of a private utility are not subject to constitutional limitation even though the utility is extensively regulated by the State); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (actions of a private school are not subject to constitutional limitation even though the school is extensively regulated and

largely financed by the State); *Blum v. Yaretsky*, 457 U.S. 991 (1982) (actions of private nursing homes are not subject to constitutional limitation even though nursing homes are extensively regulated by the State, especially in regard to their Medicaid patients who were the plaintiffs).

CONCLUSION

Petitioner's petition for writ of certiorari fails to present a substantial federal question that was decided by the courts below. Accordingly, the Court should deny the petition.

Respectfully submitted,

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